Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

October Term, 1995

RICHARD A. SCHALL,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

Petitioner for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBER
DC-0351-93-0694-I-1

DATE: October 5, 1993

RICHARD A. SCHALL,

Appellant,

v.

UNITED STATES POSTAL SERVICE,

Agency.

Richard A. Schall, Gaithersburg, Maryland, *pro se.*
Donald D. Anna, Esquire, Washington, D.C., *for the agency.*

BEFORE

Elizabeth B. Bogle
Administrative Judge

INITIAL DECISION

On August 24, 1993, the appellant filed an appeal alleging that the agency improperly denied him a promotion and reduced him in grade in violation of reduction-in-force regulations. The appellant has the burden of proving by preponderant evidence that the Board has jurisdiction over his appeal. *See* 5 C.F.R. § 1201.56(a)(2)(i). For the following reasons, the appeal is DISMISSED.

Background

The appellant occupied the position of Master Instructor, EAS-25, at the William F. Bolger Management Academy. On August 7, 1993, as part of an agency-wide reorganization, he

was assigned to the position of Operations Quality Improvement Specialist, an EAS-21 position in the agency headquarters.

Denial of Promotion

The Board's jurisdiction is limited to those matters specifically conferred on it by statute or regulation. *Cowan v. United States*, 710 F.2d 803, 805 (Fed.Cir.1983). It is well settled that no such grant of jurisdiction exists for appeals from the denial of a promotion. *See Slake v. Department of the Treasury*, 53 M.S.P.R. 207, 210 (1992); *Mello v. Department of Energy*, 20 M.S.P.R. 45 (1984). The agency's alleged failure to promote the appellant to EAS-26 is therefore not a matter that is within the Board's jurisdiction. *See* 5 C.F.R. § 1201.3.

Reduction in force

In order to appeal a reduction-in-force action to the Board under 5 C.F.R. § 351.901, an employee of the U.S. Postal Service must be a preference eligible. *See* 39 U.S.C. § 1005(a)(2). The appellant was ordered to file evidence and argument to establish that he was a preference eligible who would be entitled to appeal a reduction-in-force action to the Board. He did not respond to the Board's order.

In order to establish that he is a preference eligible, the appellant would have to file evidence and argument that he met the conditions of 5 U.S.C. § 2108(3). Because the appellant failed to present any evidence on this issue and because the record otherwise establishes that the appellant was not accorded preference eligibility by his employing agency, I conclude that the appellant has not shown or alleged that he is a preference eligible who would be entitled to appeal a reduction in force to the Board. The appellant, I conclude, has not shown that the Board has jurisdiction over his appeal from a reduction-in-force action. *See Brown v. U.S. Postal Service*, MSPB Docket No.

SL07529300541l slip op. at 4 (July 21, 1993); *Raymond v. U.S. Postal Service*, 45 M.S.P.R. 16, 19 (1990).

Because the appellant failed to raise nonfrivolous issues of fact relating to jurisdiction, he is not entitled to a hearing in his case. *See Wilson v. Merit Systems Protection Board*, 807 F.2d 1577, 1583 (Fed.Cir.1986).

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /s/ Elizabeth B. Bogle
Elizabeth B. Bogle
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on NOV 9 1993, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 806
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document was sent by regular mail this day to each of the following:

Appellant

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OCT 5 1993
(date)

/s/ Karen Rollins
Vicki Falk
Legal Assistant

Enclosure to Appellant: Guide for Pro Se Petitioners and Appellants

Source: Focus (USPS Publication)
September 1993

REASSIGNMENTS/NUMERIC SUMMARY DATA

PROMOTIONS **58%**	Of all reassignments were to higher level/grade positions. • Veterans/Preference Eligibles 10,488 employees • Non-Preference Eligibles 17,503 Employees
SAME **27%**	Of all reassignments were to same level/grade positions. • Veterans/Preference Eligibles 4,556 employees • Non-Preference Eligibles 8,622 employees
DEMOTIONS **15%**	Of all reassignments were to lower level/grade positions. • Veterans/Preference Eligibles 2,800 employees • Non-Preference Eligibles* 4,324 employees

* I, Richard A. Schall, am not a Veteran and I fall into this category. Legitimate RIF Rules, Regulations, and Procedures were not used.

THE FEDERAL TIMES

July 12, 1993

Some Postal Workers Can Appeal to MSPB

Postal service employees not represented by a union can appeal demotions or firings to the Merit Systems Protection Board , an appeals court ruled.

MSPB denied appeals from three U.S. Postal Service employees on the grounds they were not managers, supervisors or confidential employees.

The employees were appealing demotions and firings.

The law is set up so postal employees can appeal to either MSPB or the National Labor Relations Board. Managers and supervisors go to the MSPB.

Unionized employees to the NLRB. The three employees in the case were not unionized.

"MSPB's jurisdictional determination in these cases rest on reasoning that [the law] was somehow intended to permit the emergence of a third group of postal service employees without rights before either body," the appeals court said, ruling against the MSPB.

The law "cannot fairly be construed to permit the amorphous jurisdiction of the MSPB suggested by these cases."

The board failed to consider how the employees' exclusion from a union grievance procedure affected their rights to appeal to MSPB, the court found.

The court sent the three cases back to MSPB.

Geraldine McCandless et al v. Merit Systems Protection Board, 92-3434, 92-3435, and 92-3426, June 23, 1993, Federal Circuit Court of Appeals.

Ken Hughes

AMMA BULLETIN 44-93

OCTOBER 15, 1993

USPS LOOKS FOR ANOTHER CASE TO APPEAL TO MERIT SYSTEMS PROTECTION BOARD. The Postal Service has announced that it will not appeal a July 1993 Merit Systems Protection Board (MSPB) decision affecting the agency's 1992 corporate reorganization and downsizing. Instead of using *Roberts v. U.S. Postal Service* as its primary vehicle of appeal to the MSPB, postal officials in September said they would look for another MSPB ruling to appeal. In *Roberts* and in other similar decision, the MSPB ruled that he Postal Service's downsizing was in effect a reduction in force (RIF) and, thus, affected postal employees should have been granted appeal rights under existing RIF rules. The Postal Service argues that the reorganization was a RIF.

At the behest of the USPS, the Office of Personnel Management (OPM) on August 19 announced it would appeal the MSPB's July personnel rulings [See *AMMA Bulletin* 38-93]. As the OPM had yet to file its brief with MSPB before the Postal Service changed its mind, the OPM reportedly need act. The next move apparently is for the USPS attorneys to find another case to appeal. If the USPS ultimately loses its appeal, it would open the appeals process to roughly 7,000 postal employees who were demoted in the reorganization.

AMMA BULLETIN 49-93

NOVEMBER 18, 1993

APPEAL PENDING ON MERIT SYSTEMS PROTECTION BOARD RULING. The Office of Personnel Management (OPM) is studying several Merit Systems Protection Board (MSPB) decision calling the Postal Service's 1992 reorganization a reduction in force (RIF) to determine which one to appeal, according to *Federal Times* (November 22, 1993). More than 100 Postal Services cases currently are in the MSPB pipeline. The USPS in September 1993 announced that it would not ask the OPN to appeal the July 1993 Merit Systems Protection Board (MSPB) decision *in Roberts v. USPS.* Instead, the USPS said it would look for another case as its primary vehicle of appeal to the MSPB. In *Roberts*, (and other cases), the MSPB ruled that the USPS' 1992 corporate reorganization was, in effect, a RIF and, thus demoted employees should have been granted appeal rights under federal RIF rules. The USPS disagrees, arguing that positions (not employees) had been cut, and that "reassigned" employees had received saved pay/grade (thus no "demotions"). If the USPS ultimately loses its appeal, the RIF appeals process will be opened to the roughly 7,000 demoted USPS employees. At the USPS' behest, OPM on August 19, 1993, announced it would appeal the *Roberts* rulings. The OPM, which writes the government's personnel regulations, is the federal agency (and not the USPS) which has the authority to challenge the MSPB's decision in this matter.

AMMA BULLETIN

NOVEMBER 24, 1993

OPM TO APPEAL TWO USPS REORGANIZTION CASES. The Office of Personnel Management (OPM) will challenge two of the Merit Systems Protection Board's (MSPB) decisions which deemed the Postal Service's 1992 reorganization a reduction in force (RIF), according to *Federal Times*, (November 29, 1993). The OPM, which writes the government's personnel regulations, is the federal agency (and not the USPS) which has the authority to challenge the MSPB's decisions in this matter. OPM will intervene in decisions made by administrative judges in Dallas and Philadelphia and petition the MSPB to overturn their initial decisions favoring postal employees. OPM Director James King notified the MSPB November 15 and asked for the compete administrative records in two cases. If the OPM cannot get the MSPB to reverse its decisions, the agency can go to federal court to appeal.

More than 100 Postal Service cases currently are in the MSPB pipeline. The USPS in September 1993 announced that it would not ask the OPM to appeal the July 1993 Merit System Protection Board (MSPB) decision in *Roberts v. USPS*. Instead, the USPS said it would look for another case as its primary vehicle of appeal to the MSPB. In *Roberts* (and other cases), the MSPB ruled that the USPS's 1992 corporate reorganization was, in effect, a RIF and, thus, demoted employees should have granted appeal rights under federal RIF rules. The USPS disagrees, arguing that positions (not employees) had been cut, and that "reassigned" employees had received saved pay/grade (thus no "demotions"). If the USPS ultimately loses its appeal, the RIF appeals process will be opened to the roughly 7,000 demoted USPS employees.

FEDERAL TIMES *January 3, 1994*

RUNYON'S REORGANIZATION RUNS AFOUL OF RULES

By Ed Winsten
Federal Times Staff Writer

The U.S. Postal Service said it was running a reorganization in 1993, but the Merit Systems Protection Board saw it differently.

In the biggest snag to the reorganization ordered by Postmaster General Marvin Runyon, several administrative judges and the full merit board ruled in favor of more than a dozen employees appealing their transfers to downgraded positions.

It wasn't a reorganization, it was a reduction in force, and employees should have been given RIF protections, the board said.

The board repeatedly found for the employees, even though the postal service gave save grade and pay provisions to everyone who was affected by the reorganization.

The merit board rules it wasn't a reorganization, it was a reduction in force, and employees should have been given RIF protection.

About 7,000 people went to lower grade positions, including several dozen who dropped from career executive to the executive and administrative schedule.

At year's end, the Office of Personnel Management intervened and was studying two cases to appeal to the merit board for a reversal.

Should the merit board deny the appeal, OPM could go to federal court.

In other facets of the reorganization, officials were grappling with a problem late in the year—how to trim the last of the 30,000 jobs identified as overhead and superfluous.

Progress was slow because of the difficulty of finding administrative work that could be trimmed.

According to an internal memo, about 7,500 jobs ticketed for elimination still had not been trimmed.

Officials said there were plenty of vacancies for the people targeted for elimination.

And the transition centers created to find jobs for displaced closed in late November as the final group of employees left the center in Washington, D.C. Other centers around the country closed earlier in the year.

Twice during 1993 employees opinion were aired as the postal service released details of the first worker survey in February and the second in November.

Employees were disheartened by some factors but they remained loyal to the service.

FEDERAL TIMES *September 25, 1995*

HELP FOR RIF'D WORKERS

Hiring Preference Ok'd

By Leigh Rivenbark
Federal Times Staff Writer

Agencies must give job preference to qualified employees ousted in a reduction in force.

The administration is requiring agencies to select a "well-qualified surplus or displaced internal agency employee who applies for a vacant position in the commuting area, before selecting any other candidate from either within or outside the agency," said a White House memorandum sent to all agencies Sept. 12.

Where the selection does not include any internal displaced candidates, the agency must select a well qualified employee from another agency over any nonfederal candidate.

"We owe a tremendous debt to federal employees who have devoted their career to public service," President Clinton said in a press release.

The president's memo also says agencies will collaborate with state, local and other federal employers to make career transition services available and will establish policies for retraining displaced employees for other careers in government or the private sector.

The Office of Personnel Management is writing regulations and guidelines to flesh out the requirements. The guidance should be ready by mid-November.

"The underlying principle is that the government is one employer . . .and we value these employees," said Rosalie Cameron, OPM deputy communications director.

"Everybody has invested substantially in training these people," Cameron said. "The premises is, RIFs are through

no fault of the employee. We want to make sure we don't lose their talents."

OPM and agencies have yet to decide several key issues, such as whether preference applies to people who have already left under RIF's; how long after departure the employee might remain eligible for preference, and what defines "well-qualified" or a "commuting area" for preference purposes.

But Cameron said one thing is certain: Employees should not wait to be handed jobs. The requirements that agencies give preference to displaced or surplus workers does not mean agencies must locate jobs for RIF's employees.

"The person has to apply, to show they're interested in the position, and they have to end up in the top group of candidates so they are qualified," Cameron said.

Requiring preference for displaced workers should not hurt manager's ability to fill jobs with the best candidates, said Bruce Moyer, executive director of the Federal Managers Association.

"This is a huge step in the right direction" Moyer said, adding that the Defense Department's similar Priority Placement Program "has worked successfully for 30 years."

Union leaders praised the placement requirements but said there may be few jobs for displaced workers to fill.

"This proposal is a good step but it doesn't solve the problem," said Robert Tobias, president of the National Treasury Employees Union. "Agencies are not going to be in a hiring mode. Agencies are going to have to be very aggressive" about placing workers.

"I think the president is trying to send a positive message to federal employees in light of all the news about lockouts," said John Sturdivant, president of the American Federation of Government Employees.

"I'm not really sure there will be other [job] opportunities considering the budget and given the fact that all agencies are shrinking."

The Washington Post Monday, May 6, 1996 **A11**

POSTAL SERVICE CONSIDERING RUNYON RETIREMENT BONUS

Benefits Would Top $1.5 Million, Newsletter Says

By Bill McAllister
Washington Post Staff Writer

The Postal Service is considering a plan that would give Postmaster General Marvin T. Runyon benefits valued at "more than $1.5 million" after he leaves office, according to a mail industry newsletter and postal sources.

Business Mailers Review reports that the Postal Service's Board of Governors is to consider the retirement proposal today in a closed session. The newsletter said the plan may violate federal law, which limits Runyon's compensation to $148,400 a year, the same level as that for Cabinet officers.

Frank Brennan, a postal spokesman, confirmed that the governors have been discussing the issue of post retirement benefits, but said "no decision have been made." He could not offer any details of what the governors, a panel of nine presidential appointees who oversee the agency, are discussing.

Runyon, 71, has given no indication that he is ready to leave, and Brennan said Runyon is "looking forward to the challenges of making the Postal Service competitive."

Runyon, told the governors earlier this year the he will remain in office longer than four years, the minimum time he specified when he became the nation's 70th postmaster general in the summer of 1992. He has not said how long he will remain, but has spoken of wanting yet another career after he leaves the Postal Service.

While Runyon has never complained publicly about his pay, a postal source, who asked not to be named, said the postmaster general has been pushing hard for a retirement package. The source said the newsletter's account was accu-

rate, but added that the proposal could be "a public relations disaster" for the agency and probably would not win approval.

Runyon has told Congress repeatedly that he does not believe the federal agency pays its top executives enough. He has urged higher pay and bigger bonuses to the agency's top managers.

Salary was not an issue when Runyon, a former automobile executive, was hired. He has said his government job is a way to repay the nation for his success, first with Ford Motor Co. and later with Nissan, the Japanese auto maker whose U.S. plant he built and managed.

The postal newsletter said in today's edition that Runyon is expected to argue that the plan does not violate the compensation ceiling because he would receive the additional money after he leaves office. It says postal managers have hired the accounting firm of Coopers & Lybrand and "one of Washington's best connected law firms" to make the argument for the payment.

It says the financial package would included an $800,000 life insurance policy and payments of nearly $600,000, plus "a hefty bonus" if Runyon remains on the job a year or two beyond July 1.

The newsletter said Runyon has been accused of violating federal salary limits once before by boosting the pay of senior executives at the Tennessee Valley Authority, a federal agency he headed before he assumed his current job. It also said he "flouted" the salary cap by giving a $50,000 relocation bonus to Joseph R. Caraveo when he became the Postal Service's chief operating officer.

The newsletter, which has criticized Runyon in the past, labeled arguments for the bonus package as "phony". It quoted an unnamed lawyer familiar with the government's salary cap as saying that the value of the bonuses would have to be calculated at the time when the contract is signed, not when Runyon receives the money.

BUSINESS MAILERS REVIEW

Monitoring Postal Service, Private Carriers, and Suppliers
Van H. Seagraves, Publisher

Volume 14, No.3 *February 8, 1993*

Short Takes

PMG Runyon should run a mushroom farm. He is happiest when employees and critics are in the dark. At a Congressional hearing Runyon was asked why he misinformed surplused workers about their rights to appeal demotions. The Prince of Darkness had the audacity to reply: "Because we will have fewer suits." The mushroom treatment has also been applied to the Service's key financial documents. Not one *Financial and Operating Statement* has been published since last September. For more than 20 years they have recorded postal performance by each of the 13 accounting periods in a year. The publication may be discontinued, we've learned. The Postal Rate Commission and the parties that participate in rate cases are troubled by this "black-out." Recently the PRC asked the Service the status of six different reports that are overdue. PRC rules require the "timely filling" of information that details how well the Service is performing, cost trends within classes of mail, and rough estimates of future rate increases.